PBS Coals, Inc. *and* United Mine Workers of America. Case 6–CA–21118

March 14, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On September 21, 1990, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding a to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, PBS Coals, Inc., Friedens, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Employee Watson testified that Will told him following Foor's discharge, ''we all know why it was done,'' and ''you know damn well the union is going to get him the best attorney they can.'' Will denied making the statements, and the judge did not make any credibility findings with regard to this testimony. There are no exceptions to the judge's failure to make a credibility finding, and the General Counsel does not rely on Watson's testimony. Moreover, it is undisputed that Will did not participate in the decision to terminate Foor. Because the testimony of President Scott was credited that he made the decision to discharge Foor, and that his reasons for doing so had nothing to do with Foor's union activities, we find that his testimony outweighs any possible implications of Will's statements, if made. Accordingly, we find it unnecessary to resolve whether in fact such statements were made.

Patricia J. Scott, Esq., for the General Counsel.
Frederick J. Bosch. Esq., of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on July 11, 1988, by United Mine Workers of America (the Union), against PBS Coals, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint dated September 2, 1988, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Somerset, Pennsylvania, on March 9, 10, and 28, 1989, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, maintains a facility in Friedens, Pennsylvania, where it is engaged in the mining of coal and related minerals. During the year preceding issuance of the complaint, Respondent, in the course and conduct of its business operations, purchased and received at its Pennsylvania facility goods and materials valued in excess of $50,000 which were sent directly from points located outside the Commonwealth of Pennsylvania. In that same time period, it sold and shipped from its Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent's surface mining operations at Friedens are conducted at seven or eight different jobsites and cover a 400- to 500-acre area. In all, some 220 individuals are employed to work at the various sites.

Following unsuccessful efforts in prior years, the Union launched an organizational drive among the PBS employees in March 1988. On March 14, employee Richard Foor attended a union meeting and, thereafter, Foor actively supported the Union. Respondent's officials first learned of the organizational activity in mid-April, when nonemployee organizers distributed literature at the entrance to a jobsite. No later than May 13, 1988, they learned of Foor's support for the drive as, on that date, Foor and employee Terry Waler distributed literature at a jobsite entrance. On July 6, 1988, Foor was discharged.

In the instant case, the General Counsel contends that Respondent discharged Foor in reprisal for his union activities, in violation of Section 8(a)(3) of the Act. Respondent asserts that Foor's discharge occurred solely as a result of his abusive and hostile attitude, directed at the Company in general and his supervisors in particular, and due to his involvement in criminal activities on company property. Also at issue is whether Respondent violated Section 8(a)(1) of the Act by threatening its employees with loss of employment and plant closure if they selected the Union to represent them.

B. *Facts*[1]

Richard Foor was employed by Respondent for some 20 years. At the time of his July 6, 1988 discharge, he worked as a dragline operator. Shortly after the discharge, on October 3, 1988, Foor pleaded guilty to felony and misdemeanor charges of dealing in vehicles with removed or falsified vehicle identification numbers, activities which he had pursued on company premises in the months preceding his separation from employment.

In February 1988, and prior to the advent of the Union, Foor received a verbal warning from the PBS general manager, Dwight Latham, for using profanity on the company radio. Foor, operating his personal CB radio, which was keyed to the same channel as the company radios (used for safety purposes) were tuned, complained about an assignment received from one of his supervisors, using terminology including ''I don't give a fuck what you do.'' Latham told Foor that his attitude, and his use of profanity over the radio, were intolerable, and he cautioned Foor to stay off the radio. In his testimony in this proceeding, Latham conceded that he has heard other employees use profanity at work, but, he further testified concerning the Foor incident, ''more than the profanity was the attitude that it was used with.''

As noted, Foor attended his first union meeting on March 14. Thereafter, he solicited the signatures of his fellow employees on union authorization cards, on and off the job, and, in all, obtained seven signed cards. Foor also placed union stickers on personal items which he carried in his car. He testified that, within a month of the March 14 meeting, he placed union insignia on the car itself, which he drove to work. There is evidence that Foor was the only employee to display such insignia prior to May 1988.

On April 7, Foor received a written warning, issued by Foreman Rich Lively, for ''misuse of company radio and interruption of job safety and production'' which occurred on April 5. In that connection, Foor and employee Terry Walker, on April 5, using the same channel to which the company radios were tuned, broadcast music over their CB radios, thereby blocking company access to the airwaves. Walker received a verbal reprimand. PBS employees had previously been instructed that the radios were for company use only, for communication and safety purposes.

On April 15, Foor, at his request, and accompanied by employee Walker, met with Respondent's president, Robert Scott. According to the credited testimony of Scott, Foor voiced his displeasure at having received the written warning for misuse of the company radio. Scott stated that the radio was there for safety reasons and for communications between the draglines and the other equipment. When Foor admitted that he knew that what he had done was wrong, Scott asked him why he did it. Foor stated that he did not like his supervisors, and he was ''baiting'' them. Scott warned Foor that:

> . . . its silly to try and bait your supervisors. And if you keep on doing that you'll get yourself into trouble. You keep on with that attitude you have . . . you just cannot run up against your supervisors just because you don't like them, that just doesn't get you anywhere. Why don't you keep your head down . . . keep a low profile, keep yourself out of trouble and let's sort things out, just stay out of trouble.

Foor voiced complaints about his supervisors, and their methods of operation, and asked Scott for a transfer to a newly opened jobsite which was closer to his home. Scott told Foor that he would be favorably considered for the transfer.

Foor testified that, at the April 15 meeting, Scott stated that the Company could not afford a union. Scott denied that he made such a statement and his testimony was corroborated by employee Walker. For the reasons stated at footnote 1, I credit Scott and find that, at the meeting in question, he did not tell Foor and Walker that Respondent could not afford a union.

On May 13, Foor and Walker openly distributed union leaflets at a jobsite entrance and, concededly, at least as of that date, Respondent became aware of Foor's support for, and activities on behalf of, the Union. Later that month, Foor made further complaints to Scott about the operational methods of the general manager, Dwight Latham. On May 17, Foor's request to transfer to another jobsite was granted.

Foor leased a garage, owned by PBS and located on company premises, which he used to dismantle cars and sell parts. On March 29, Respondent sent a letter to Foor concerning the complaints of neighbors about the operation of the garage and violations of the lease agreement. In mid-April, Respondent learned that the district attorney suspected that Foor was using the garage to dismantle stolen vehicles. In May, Respondent was advised that the police had recovered a stolen vehicle from the premises, after dragging a pond. On May 19, PBS sent a letter to Foor, terminating the lease agreement. On June 7, Foor was arrested while at work.

When Foor arrived for work on July 6, he learned that Respondent had changed an earlier operational decision, and would operate the pan instead of the dragline that morning. When Latham appeared at the jobsite, he was confronted by Foor. Foor testified that he told Latham that:

> I had a fucking dog smarter than this outfit that could run this operation better . . . I asked him if this was going to be a national fucking pastime, switching back and forth from pan to drag . . . when my dog had to take a shit, he went and done it, it didn't take him three months to decide.

Later that day, Latham gave Foor a termination letter which made reference to the confrontation that day in which Foor ''directed profane and abusive language'' to Latham and ''otherwise demonstrated an insubordinate and disrespectful attitude.''

Lathan, testified that, following Foor's July 6 outburst, he recommended to Respondent's officials that Foor be discharged as he was unwilling any longer to put up with Foor's insubordination and his attitude toward his job, his supervisors, and the Conpany. Latham testified that, while em-

[1] The factfindings contained in this section are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra. In general, I have relied on the testimony of Respondent's president, Robert Scott, who impressed me as a sincere, honest, and most believable witness in possession of a clear recollection of events. On the other hand, I have viewed with suspicion uncorroborated testimony of the alleged discriminatee, Foor, in light of his unconvincing demeanor as a witness and his recent conviction of a felony and misdemeanors involving dishonesty.

ployees commonly used profanity on the job, no employee had ever spoken to him the way that Foor did on July 6. Lathan, further testified that, at the time of the discharge recommendation, he had no problem with the quality of Foor's work and was aware of his support for the Union.

The decision to discharge Foor, after receiving the recommendation of Latham, as made by Scott. He testified that the Latham incident convinced him that Foor would not improve his attitude and that nothing else he could say ''was going to change the chap.'' He further testified, concerning the reasons for the discharge:

> Well, really the whole history. It [the Latham confrontation] was almost like a last straw. It was a combination all the way through from the verbal, the written, the chats I'd had with him, the criminal investigations, and again, you know an ongoing, if you like, insubordination and disrespect.

Scott denied that union activities played any role in the decision.

Employee Gary Watson, who was present during the Foor-Latham confrontation of July 6, testified that, on July 7, Foreman Robert Will told him that he had had nothing to do with the Foor discharge. According to Watson, Will stated that ''we all know why it was done'' and, further, that ''you know damn well the union is going to get him the best attorney they can.'' Watson further testified that Will advised him to compile notes of what went on during the Foor-Latham incident. Will, in his testimony, denied having discussed the Foor termination with Watson, or having told Watson that the Union would get Foor a good attorney. He conceded that he might have told Watson to compile notes about the July 6 incident.

Beginning in March, and continuing until August, John Matsco, Respondent's safety director, conducted safety training classes on Respondent's premises. Each class was attended by 10 to 12 employees. According to Matsco, at these meetings, employees frequently raised the subject of the Union. Employee Walker testified that, at a safety class conducted on May 20, 1988, Matsco stated that the Company could not afford a union and, if the Union came in, the employees would all be looking for work. Employee Richard Zorn testified about a safety meeting held on July 15. According to Zorn, at that meeting, an employee asked Matsco what he thought about the Union. Matsco responded, stating that he believed that if the Company were organized it would be forced to shut down as it could not afford to pay the Union.

Foor testified that, early in June, Matsco approached him at his work station and stated that the Company could not afford a union and, if the Union got in he was sure the employees would all be looking for work. Matsco asked Foor to remove the stickers from his car, and Foor refused. Employee Rex Stone, who was present for a portion of the Foor-Matsco conversation, testified that Matsco told Foor that if the Union got in, the Company would have to close.

Matsco, in his testimony, denied ever telling the employees at safety meetings, or Foor privately, that, if the Union got in, the Company would shut down. According to Matsco, he talked about the Union at safety meetings only when the subject was raised by the employees. He testified that he told the employees that, if the Union came in, the Company ''could'' bargain in good faith but, if the Company could not come to terms with the Union, and there was an economic strike, the Company could continue operations by hiring replacements. If the Company could not keep the operation going, there might be a shutdown. Matsco further testified that he talked to the employees about the economics of the coal industry, but did not discuss the cost of having a union.

As to the early June conversation with Foor, Matsco conceded that he askd Foor to remove the union stickers from his car. Matsco denied that he told Foor that if the Union got in, the Company would shut down.

Walker, Zorn, and Stone impressed me as believable witnesses. On the other hand, Matsco's testimony concerning the safety meetings, and his conversation with Foor, was convoluted, and lacked the ring of truth. Based on the testimony of Walker and Zorn, I find that, at the May 20 and July 15, 1988 safety meetings, Matsco stated, respectively, that, if the Union came in the employees would all be looking for work and, if the Company were organized, it would be forced to shut down. I also find, based on Stone's testimony, that, in early June, Matsco told Foor that, if the Union got in, the Company would have to close.

C. C*onclusions*

As shown in the statement of facts, Respondent, by its supervisor, John Matsco, told its employees at group meetings held on May 20 and July 15, 1988, and at a private meeting with Foor, attended by Stone, in early June 1988, that, if the employees selected the Union to represent them, they would lose their jobs and/or Respondent would shut down. Those statements were not accompanied by objective appraisal of facts and were patently designed to intimidate.[2] As Matsco's statements cannot be categorized as carefully phrased predictions based on objective facts so as to convey a belief that closure and/or loss of employment was a probable consequence of unionization beyond Respondent's control, such statements do not fall within the protections of Section 8(c) of the Act.[3] I conclude that Respondent, by Matsco's remarks of May 20, early June, and July 15, 1988, violate Section 8(a)(1) of the Act in threatening its employees with loss of employment and plant closure if they selected the Union to represent them.

I have also found that, at the July 15 meeting, with employees Foor and Walker, Scott did not state that the Company could not afford a union. Accordingly, the complaint allegation in that regard must be dismissed.

Finally, I conclude that Foor's discharge occurred as a result of his abusive, hostile, and insubordinate attitude toward Respondent and its supervisors, and due to his involvement in criminal activities on Respondent's premises, and not as a result of his union activities. In reaching this conclusion, I acknowledge that the General Counsel established a prima facie case of unlawful discharge in showing that, at the time of the discharge, Foor was active on behalf of the Union; Respondent knew of his activities and sentiments and, as revealed by the Matsco threats, Respondent harbored antiunion animus.

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[2] See *TVA Terminals*, 270 NLRB 284 (1984).

[3] See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

However, Respondent has rebutted the General Counsel's case and proven that the discharge would have occurred in the absence of protected activities. In the months preceding the discharge, Foor received verbal and written warnings for abusive conduct and conduct interfering with production and safety. The first warning predated his union activities and the second came, apparently, before Respondent was aware of those activities. In Mid-April 1988, Foor told Respondent's president that he was trying to ''bait'' his supervisors. In June, he was arrested, and he was subsequently convicted for havng engaged in felonious activities on Respondent's premises. In July, immediately preceding the discharge, Foor launched an extremely abusive diatribe at Respondent's general manager, which, standing alone, adequately would explain a discharge for misconduct. In these circumstances, and in light of the convincing testimony of Scott, acceptance of Respondent's argument, that the discharge occurred as a result of the above-referenced factors and not because of union activities, is compelling. I therefore conclude that, by discharging Foor, Respondent did not violate the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the polices of the Act.

CONCLUSIONS OF LAW

1. PBS Coals, Inc. is an employer engaged in commerce and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with loss of employment and plant closure if they selected the Union to represent them, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not otherwise violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, PBS Coals, Inc., Friedens, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of employment and plant closure if they select the Union to represent them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Friedens, Pennsylvania facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with loss of employment or plant closure if they select a union to represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

PBS COALS, INC.